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No. 94-1867

In the Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN LIFE LEAGUE, INC., ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress lacked authority under the Commerce Clause and the Fourteenth Amendment to enact the Freedom of Access to Clinic Entrances Act of 1994.

2. Whether the Freedom of Access to Clinic Entrances Act is an unconstitutional content or viewpoint based restriction on speech.

3. Whether the Freedom of Access to Clinic Entrances Act is unconstitutionally vague or overbroad.

4. Whether the Freedom of Access to Clinic Entrances Act infringes on rights protected by the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 47 F.3d 642. The opinion of the district court (Pet. App. 25a-37a) is reported at 855 F. Supp. 137.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1995. The petition for a writ of certiorari was filed on May 12, 1995. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Background*

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (the Access Act) (to be codified at 18 U.S.C. 248)[1] in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. From 1977 through April, 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.). Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. *Id.* at 3,6. This violence endangered the lives of and inflicted injuries on physicians, clinic staff and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. *Id.* at 5.

Groups opposed to abortion also organized blockades designed to bar access to health care clinics and to overwhelm local law enforcement. S. Rep. 7. From 1977 through April, 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. *Ibid.*; see also *National Org. for Women* v. *Operation Rescue*, 726 F. Supp. 1483, 1489-1490 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part on other grounds, vacated in part *sub nom. Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). Providers of abortions also received numerous death threats. S. Rep. 10.

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[1] All references to 18 U.S.C. 248 are to the 1994 edition of the United States Code, in which that Section will be codified.

Violence aimed at abortion providers and facilities, including shootings, bombings, arson, death threats, chemical attacks, and clinic blockades, has occurred in at least 28 States, the District of Columbia, and dozens of cities. S. Rep. 12. Many of these activities have been organized nationwide and directed across state lines. *Id.* at 13. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. *Id.* at 31. Many patients seeking such services travel to obtain services in another State (*ibid.*), and clinic employees often travel across state lines to work (*ibid.*).

The declared purpose of the violent and threatening activities aimed at abortion providers, facilities, and patients has been to inhibit women's access to safe and legal abortion services. *Id.* at 11 & n.22; *NOW*, 726 F. Supp. at 1488. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and closing clinics. Congress concluded that this violent and threatening conduct

> interfer[es] with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994). See also S. Rep. 11, 32.

Congress found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. S. Rep. 17. Congress passed the Access Act in

response to the record of nationwide violence and obstruction. President Clinton signed the bill into law on May 26, 1994. The Act provides civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injuries, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services.

Access Act § 3, 108 Stat. 694 (18 U.S.C. 248(a)).[2]

In addition to defining a number of its terms, the Act provides, as one of its "Rules of Construction," that "[n]othing in this section shall be construed * * * (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." Access Act § 3, 108 Stat. 696 (18 U.S.C. 248(d)(1)).

The civil remedies prescribed by the Act include injunctive relief, compensatory or statutory damages, punitive damages, and costs and fees. Access Act § 3,

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[2] The Act also prohibits the same activities if directed at any person lawfully exercising or seeking to exercise the right of religious freedom at a place of religious worship, or the property of a place of religious worship. Access Act § 3, 108 Stat. 694 (18 U.S.C. 248(a)(2) and (3)). Petitioners do not challenge any of those provisions.

108 Stat. 695-696 (18 U.S.C. 248(c)). The Act authorizes civil actions by the Attorney General of the United States or a State Attorney General. *Ibid.* (18 U.S.C. 248(c)(2) and (3)). In such actions, the court may also impose a monetary penalty not exceeding a statutorily specified amount, which varies depending on the nature of the offense. *Ibid.* Persons involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services also may bring civil actions for certain civil remedies. Access Act § 3, 108 Stat. 695 (18 U.S.C. 248(c)(1)).

The criminal penalties prescribed by the Act vary with the nature of the violation, depending on whether the conviction is for a first offense and the level of violence involved. Access Act § 3, 108 Stat. 695 (18 U.S.C. 248(b)).

2. ***Factual Background***

Petitioner's Second Amended Complaint was dismissed for failure to state a claim upon which relief could be granted. The following statement therefore assumes the truth of the facts stated in that complaint.

Petitioner American Life League, Inc., conducts educational and legislative activities regarding the rights of "persons born and unborn." See Pet. App. 3a (quoting Second Amended Complaint). The five individual petitioners oppose abortion "upon theological, moral and other grounds." *Ibid.* One petitioner has often prayed near clinics that perform abortions and the other petitioners have conducted peaceful demonstrations that have physically obstructed access to abortion clinics. *Ibid.*

Petitioners filed this action against the Attorney General of the United States alleging that the individual petitioners' continuing anti-abortion activities put them in jeopardy of violating the Access Act and that the Act violates the Constitution and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* Pet. App. 3a. Additional defendants were allowed to intervene, including a reproductive health clinic, two physicians, and the National Organization for Women. *Id.* at 4a.

The district court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. Pet. App. 25a-37a. The court of appeals affirmed. *Id.* at 1a-24a.[3] The court concluded that Congress had the authority under the Commerce Clause to enact the Access Act. *Id.* at 7a. The court found that, "[b]ased on an extensive legislative record, Congress rationally concluded that violence, threats of force, and physical obstructions aimed at persons seeking or providing reproductive health services affect interstate commerce." *Ibid.* The court reviewed the congressional findings and concluded that Congress found that interstate commerce was threatened. *Ibid.* It also ruled that the regulatory means chosen by Congress are reasonably adapted to the Act's permissible ends, including protecting the flow of goods and services in commerce, protecting patients in their use of lawful reproductive health clinic services, protecting women exercising their con-

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[3] Based on its decision in this case, the court of appeals also affirmed the dismissal of the complaint in *Woodall* v. *Reno*, 47 F.3d 656 (4th Cir. 1995). The Court denied a petition for a writ of certiorari in that case on June 19, 1995. *Woodall* v. *Reno*, No. 94-1417.

stitutional right to choose an abortion, protecting the safety of reproductive health care providers, and protecting reproductive health care facilities from physical destruction and damage. *Ibid.*

The court also held that the Access Act does not violate the First Amendment's Free Speech Clause. The court reasoned that the Act targets constitutionally unprotected activities such as violence, threats and blockades. To the extent it incidentally proscribes some conduct with expressive elements, such as peaceful but obstructive picketing, the Act is content and viewpoint neutral and therefore subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). Pet. App. 11a-13a. The court found that the Act serves substantial government interests, is not aimed at expression, is narrowly tailored, and leaves open ample alternative means for communication. *Id.* at 14a-17a. The court rejected petitioners' claim that the Act is unconstitutionally vague or overbroad. *Id.* at 17a-18a.

Finally, the court of appeals ruled that the Act does not violate the First Amendment's Free Exercise Clause or RFRA. The court reasoned that the Access Act "punishes conduct for the harm it causes, not because the conduct is religiously motivated." Pet. App. 20a. The court held that, unlike the ordinances at issue in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 113 S. Ct. 2217 (1993), which singled out religious practices for discriminatory treatment, the Access Act is a "generally applicable law, neutral toward religion," and therefore does not violate the Free Exercise Clause. Pet. App. 20a. With regard to RFRA, the court ruled that the Access Act serves compelling government interests and is narrowly

tailored to prohibit only activity that Congress found to be a national problem, *i.e.*, force, threats of force, and physical obstruction. *Id.* at 23a. The court pointed out that "those opposed to abortion or to any other reproductive health service retain the freedom to express their deeply-held moral or religious views in a peaceful, non-obstructive way." *Id.* at 24a.

ARGUMENT

1. Petitioners contend (Pet. 7-12) that Congress exceeded its authority under the Commerce Clause by enacting the Access Act. Petitioners argue (Pet. 9) that the Act is invalid under *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), because the activity it prohibits does not substantially affect interstate commerce.[4]

The Court in *Lopez* reaffirmed Congress's power under the Commerce Clause to regulate three broad categories of conduct. 115 S. Ct. at 1629-1630. First, Congress is empowered to regulate the use of the channels of interstate commerce. *Id.* at 1629. Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* Third, Congress is empowered to regulate or prohibit "activities that substantially affect interstate commerce." *Id.* at 1629-1630.

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[4] Petitioners also contend (Pet. 12-14) that Congress did not have authority to enact the Access Act under Section 5 of the Fourteenth Amendment. In light of its ruling that the Access Act is within Congress' commerce power, the court of appeals did not reach this issue. Pet. App. 6a.

The Access Act passes muster under two of the categories identified by the Court in *Lopez*. First, the Act may be sustained as a proper exercise of Congress's power to regulate or protect "persons or things in interstate commerce." 115 S. Ct. at 1629. Congress reasonably concluded that "persons [who are] * * * obtaining or providing reproductive health services," Access Act § 3, 108 Stat. 694 (18 U.S.C. 248(a)(1)), often move in interstate commerce. As the Senate Report observed, "many of the patients who seek services from [abortion providers] engage in interstate commerce by traveling from one state to obtain [the abortion] services in another." S. Rep. 31; accord H.R. Rep. No. 306, 103d Cong., 1st Sess. 10 (1993) (H.R. Rep.). Additionally, physicians and other reproductive health services providers often travel across state lines to provide abortion services. *Ibid.* Substantial evidence also demonstrated that reproductive health services facilities acquire and dispense equipment, "medicine, medical supplies, surgical instruments and other necessary medical products * * * from other States." S. Rep. 31. Cf. *United States* v. *Robertson*, 115 S. Ct. 1732, 1733 (1995) (per curiam).

The Access Act may also be sustained as an exercise of Congress's power to regulate "activities that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630. Congress is empowered to regulate conduct that "substantially affects" interstate commerce when considered in the aggregate. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154

(1971) (emphasis omitted) (upholding federal law criminalizing loan sharking without regard to whether particular loan transaction affected interstate commerce); see also *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257-258 (1964) (motel catering to interstate guests); *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329-330 (1991) (boycott against one opthalmologist affects interstate commerce).

As indicated above, Congress had ample basis for concluding that reproductive health services substantially involve interstate commerce: Providers purchase supplies from sources in other States; clinic employees and doctors often cross state boundaries to get to work; and many patients who seek abortion services "engage in interstate commerce by traveling from one state to obtain services in another." S. Rep. 31. Congress also had ample basis for concluding that the violent and obstructive conduct proscribed by the Access Act may have an adverse impact on this interstate commerce. S. Rep. 14, 17, 31; H.R. Rep. 8-9. Such conduct has forced some clinics to close, caused millions of dollars in damages to others, and reduced the availability of reproductive health services and the interstate movement of people and goods. S. Rep. 5, 17, 31; H.R. Rep. 8. The purpose of the conduct is to suppress commerce in abortion services. S. Rep. 32. Extensive evidence that interference with abortion services is a problem of national scope further buttresses Congress's conclusion that the proscribed conduct has a substantial effect on interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 300-301 (1964) ("nationwide scope" of the problem of discrimination supported Congress's conclusion that it substantially affected interstate commerce).

The Access Act differs in several relevant respects from the statute held invalid in *Lopez*. In *Lopez*, the Court held invalid the provision of the Gun Free School Zones Act that made criminal the possession of a firearm in the vicinity of a school. The Court reasoned that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 115 S. Ct. at 1630-1631; *id.* at 1640 (Kennedy, J., joined by O'Connor, J., concurring). The Court concluded that "possession of a firearm in a local school zone does [not] substantially affect interstate commerce," *id.* at 1632, noting that possession of a gun in the vicinity of a school zone bore such an attenuated relationship to interstate commerce that the Court would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce, *id.* at 1634. The Court also noted the absence of evidence or congressional findings demonstrating that the regulated conduct substantially affects interstate commerce. *Id.* at 1631.

In contrast, the Access Act "by its terms" directly addresses "commercial activity" and "economic enterprises," and prohibits interference with persons because they are engaging in commercial transactions, § 3, 108 Stat. 694, (18 U.S.C. 248(a)(1) ("obtaining or providing reproductive health services")). It also prohibits blockading of commercial facilities, § 3, 108 Stat. 696 (18 U.S.C. 248(e)). Such blockading interferes with the provision of an interstate commercial service and threatens in the aggregate to eliminate abortion services from national commerce. See S. Rep. 3. The "design of the statute ha[s] an evident commercial nexus," *Lopez*, 115 S. Ct. at 1640. It ensures access to a particular commercial service

and is designed to prevent elimination of that service from the national commerce. No inferential leaps are required—the purpose and effect of the prohibited conduct are to halt a service that Congress concluded is part of interstate commerce. The Access Act is also supported by a legislative record containing abundant evidence and specific congressional findings of the effect of the proscribed conduct on interstate commerce.

The district court decision in *United States* v. *Wilson*, 880 F. Supp. 621, (E.D. Wis. 1995), appeal pending No. 95-1871 (7th Cir.), does not justify review by this Court at this juncture. In holding that the statute exceeds congressional authority to legislate under the Commerce Clause and the Fourteenth Amendment, the Wilson court parted company with every other court that has considered the validity of the Access Act. The opinion in *Wilson* was issued prior to this Court's opinion in *Lopez*, and, for the reasons already noted, its holding is incorrect. In an opinion issued after the Court's opinion in *Lopez*, the Eleventh Circuit upheld the Access Act as within Congress's Commerce Clause power and expressly rejected the reasoning of the district court in *Wilson*. *Cheffer* v. *Reno*, 55 F.3d 1517, 1521 n.6 (1995). The *Wilson* case is currently pending on appeal before the Seventh Circuit. Such an erroneous district court decision creates no conflict in the circuits calling for this Court's review.

2. Petitioners contend (Pet. 19-26) that the Access Act is facially invalid under the First Amendment because it is a content and viewpoint based restriction on speech. Petitioners' arguments in this regard are substantially similar to those raised by petitioners in *Woodall* v. *Reno*, No. 94-1417, which

the Court declined to review. See note 3, *supra*. The Court should deny review of these issues in the present case for the same reasons.

a. Petitioners' argument is based on a fundamental misunderstanding of the prohibitions contained in the Access Act. The Act regulates conduct, not speech. The Act does not prohibit speech—even speech that strongly opposes abortion—in the immediate vicinity of facilities that provide abortions. Instead, it prohibits the use of "force," the "threat of force," and "physical obstruction" to achieve certain ends. As this Court has made clear, such conduct is outside the scope of First Amendment protection. See *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993) (violence and physical assaults not protected by First Amendment); *Madsen* v. *Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994) (threats not protected by First Amendment); *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2546 (1992) (same); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (First Amendment does not create right to cordon off streets or entrances to a building); *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (upholding statute forbidding unreasonable interference with access to buildings).[5]

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[5] The Act also provides narrowing definitions of several key terms that further limit the conduct it proscribes. Access Act § 3, 108 Stat. 696 (18 U.S.C. 248(e)). The Act defines "interfere with" to mean "to restrict a person's freedom of movement." *Ibid.* (18 U.S.C. 248(e)(2)). "Intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." *Ibid.* (18 U.S.C. 248(e)(3)). "Physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services * * *, or rendering passage to

The Act does not restrict petitioners' ability to communicate with their desired audience. The Act permits speech, signs, prayer, non-obstructive picketing, distribution of handbills, and other peaceful forms of expression, even in the immediate vicinity of covered facilities and regardless of the content of the speech. See *United States* v. *Brock*, 863 F. Supp. 851, 864-865 (E.D. Wis. 1994), appeals pending, Nos. 95-1308, 95-1309, 95-1333, 95-1430, 95-1488, 95-1494 (7th Cir.); *Riely* v. *Reno*, 860 F. Supp. 693, 700-704 (D. Ariz. 1994); *Council for Life Coalition* v. *Reno*, 856 F. Supp. 1422, 1426-1427 (S.D. Cal. 1994).

b. Even if the conduct regulated by the Access Act had sufficient expressive content to implicate the First Amendment, the Act would easily survive scrutiny under the test set forth by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Act (a) serves a substantial governmental interest, (b) restricts conduct for reasons unrelated to its expressive content, and (c) does not impinge unnecessarily on expression. See *id.* at 377.

The Act serves at least three substantial and legitimate governmental interests: preventing violence, preserving public access to health care, and protecting the exercise of the right to abortion. Those interests are unrelated to any expressive content the for-

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or from such a facility * * * unreasonably difficult or hazardous." *Ibid.* (18 U.S.C. 248(e)(4)). "Reproductive health services" means "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." § 3, 108 Stat. 696-697 (18 U.S.C. 248(e)(5)).

bidden conduct may have. Nor does the Access Act proscribe conduct with reference to its expressive content, if any. As explained above, the Act permits the expression of any message, including a message of hostility to abortion.

In addition, the Act does not limit its protection to "abortion clinics"; it covers all facilities offering reproductive health services, including facilities offering services related to carrying pregnancies to term. The use of force or physical obstruction to blockade such a facility violates the Act as does a blockade of a facility offering abortion services.

Nor does conduct violate the Act only when correlated with a particular message or viewpoint. For example, a person who supports the right to abortion might have purely personal reasons for desiring to stop a particular woman from having a particular abortion; the use of force to achieve this end would violate the Act. Petitioners' assertion that the Act applies only to those who oppose abortion is incorrect: the Act proscribes conduct without regard to the message conveyed (if any) or the viewpoint of the person engaging in that conduct.

Petitioners assert (Pet. 18) that the legislative history of the Act shows that the Act's purpose was to restrain anti-abortion protests. The violence and blockades in which some anti-abortion protestors engaged were catalysts that led to passage of the Act; the legislative history, however, shows no congressional animus toward the message conveyed by such protestors. Congress designed the Act to proscribe unprotected *conduct*, while leaving protestors completely free to convey their message by lawful means.

The Act proscribes certain conduct only when a person directs that conduct at another "because" the

other seeks to obtain or provide reproductive health services. This requirement concerns the motive of a violator, not the message that person wishes to convey. The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1933).[6]

The fact that the majority of persons who wish to engage in conduct that would violate the Access Act may, in practice, be persons who desire to express a message of hostility to abortion does not undermine the constitutionality of the Act. As *O'Brien* established, if a statute neutrally proscribes conduct, the fact that people who follow a particular ideology are more likely than others to engage in that conduct, or that such people wish to use illegal activity to express a message, does not affect the validity of the prohibition. The law at issue in *O'Brien* forbade the destruction of draft cards—conduct that, at the time the law was passed, was generally engaged in only by persons intending to express a message of hostility to the Vietnam war. But the law was nonetheless constitutional because it proscribed conduct without regard to any intended or unintended message. The Access Act similarly proscribes violent, threatening or obstructive conduct, regardless of any

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[6] The motive requirement of the Access Act limits the coverage of the law to conduct that implicates federal concerns. It distinguishes the use of force for the deliberate purpose of interfering with access to reproductive health services from, for example, a random attack of a woman on her way to receive such services, by an offender who neither knew nor cared where his victim was going. Such an attack would not implicate the federal concerns that led to passage of the Access Act, and Congress has chosen to leave such conduct to state regulation.

viewpoint of the violator or content of the message he or she may want to send.

The Access Act is narrowly tailored so as not to impinge unnecessarily on expression. Narrow tailoring is satisfied if a prohibition "promotes a substantial government interest that would be achieved less effectively absent" the restriction, and if the prohibition does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989). The Act easily meets that test. It is narrowly drawn to prohibit only unprotected conduct, not speech. Its limiting definitions of key statutory terms further ensure that it proscribes only force, threats, and blockades that interfere with access to reproductive health care. The Act does not unnecessarily impinge on expression; indeed, even in the immediate vicinity of covered facilities, the Act leaves open every peaceful and non-obstructive means for people to express their views.

This Court's recent decision in *Madsen* v. *Women's Health Ctr., Inc., supra*, confirms the Act's constitutionality. *Madsen* concerned protests outside a women's health clinic in Florida. A state court enjoined the defendants and those acting in concert with them from, *inter alia*, engaging in essentially the same conduct that is forbidden by the Access Act: (1) interfering with access to, ingress into, and egress from the clinic; (2) physically abusing, intimidating, harassing, touching, or assaulting persons entering or leaving the clinic; and (3) harassing, intimidating or threatening any doctor or other employee of the clinic. See 114 S. Ct. at 2522. The injunction was limited in its application to the named, pro-life activist defendants and those acting in concert with them.

This Court nevertheless held the injunction to be content neutral; the Court concluded that the restrictions were unrelated to the defendants' message and that any effect on their expression was incidental to the government's regulation of threatening conduct. *Id.* at 2524.[7]

3. Petitioners assert (Pet. 24-25) that the Access Act is unconstitutionally vague and overbroad. As noted above, however, the Act prohibits only the use of force, the threat of force, or physical obstruction to achieve certain ends. The term "physical obstruction" is defined to mean

> rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous.

Access Act § 3, 108 Stat. 696 (18 U.S.C. 248(e)(4)). This provision is almost identical to one this Court upheld against a vagueness challenge in *Cameron* v. *Johnson*, *supra*. That case concerned a Mississippi law that made it a crime for

> any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from [specified buildings].

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[7] *Madsen* held that a more stringent First Amendment test applies to content-neutral injunctions than to content-neutral statutes. 114 S. Ct. at 2524-2526. *Madsen* accordingly demonstrates the error of petitioners' assertion (Pet. 19-20) that the Access Act should be subject to more stringent scrutiny than the *Madsen* injunction.

Id. at 612 n.1. As in *Cameron*, the statute here "clearly and precisely delineates its reach in words of common understanding." *Id.* at 616.[8]

4. a. Petitioners assert (Pet. 27-28) that the Access Act violates the Free Exercise Clause because its object is to restrict practices due to their religious motivation. Petitioners contend that the Act is invalid under *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 113 S. Ct. 2217 (1993), because the Act is an attempt by abortion advocates "to suppress the religiously motivated expression and conduct of their opponents." Pet. 27.

In *Lukumi*, the Supreme Court struck down city ordinances prohibiting the ritual slaughter of animals as practiced by the Santeria religion. The Court found that the city council, although ostensibly acting toward secular ends such as the protection of animal welfare, in fact adopted laws that pursued those ends only with regard to conduct motivated by religion, and carefully exempted conduct, such as hunting, that involved an identical degree of harm to animals but was not religious in nature. See 113 S. Ct. at 2222, 2229. The legislative history of the laws also showed extreme, express hostility by city council members toward the disfavored religion. *Id.* at 2231.

In contrast, the Access Act forbids specified conduct without regard to whether it was undertaken

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[8] Petitioners also challenge (Pet. 25-26) the provision for awarding damages under the Access Act contending that the Act impermissibly requires payment of damages for commercial injuries caused in whole or in part by First Amendment expression. The court of appeals correctly rejected the claim because the Access Act "does not subject anyone to damages caused by protected expression," but only for unprotected conduct. Pet. App. 18a-19a.

for religious or secular reasons. Whether a violator acts out of religious conviction or because of a completely secular view makes no difference under the Act. The same conduct is forbidden for all. The Court has held that neutral, generally applicable law does not offend the Free Exercise Clause, regardless of whether it has an incidental effect on religious practices. *Employment Division* v. *Smith*, 494 U.S. 872 (1990). The Act does not have the hidden effect of proscribing only religious conduct. Nor is there evidence of legislative hostility toward religion.[9] In any event, the Act serves compelling government interests, including protection of public health and safety. See p. 21, *infra*.

b. Petitioners also assert (Pet. 28-29) that the Access Act violates RFRA, 42 U.S.C. 2000bb *et seq.*

RFRA provides that the government may not "substantially burden a person's exercise of religion" unless it "demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that * * * interest." 42 U.S.C. 2000bb-1 (Supp. V 1993). Petitioners' exercise of religion is not substantially burdened here. They do not contend that physical obstruction of clinics is necessary to their observance of their faith. Pet. App. 36a. They allege that they desire to pray for the souls of women obtaining abortions and for the souls of unborn children. *Ibid.* The Act does not preclude petitioners from such prayer, even in the vicinity of abortion clinics. They are simply precluded from using force, threats of

[9] The Access Act was passed by the same Congress that passed the Religious Freedom Restoration Act, and the Access Act itself provides new protection against interference with religious activities at places of religious worship.

force, or physical obstruction; and petitioners do not assert that the use of force, the threat of force or physical obstruction is a part of their exercise of religion. Because the Access Act forbids only activities that are not alleged to be part of petitioners' religions, while leaving them free to engage in religious activities such as prayer, it places no burden on their exercise of religion.

Moreover, the court of appeals correctly ruled that the Access Act serves compelling governmental interests—"[a]fter all, the Act protects public health by promoting unobstructed access to reproductive health facilities. It also protects public safety by proscribing all violent, threatening or obstructive conduct specifically aimed at patients and providers of reproductive health services." Pet. App. 23a. The court of appeals also correctly ruled that the Act is sufficiently narrowly tailored. *Ibid.* As discussed above, the prohibitions of the Act, and the definitions of the Act's terms, are directed only to conduct involving force, threats of force, or obstruction that Congress found to be a grave national problem. The Act does not sweep within its scope activities unrelated to the evil Congress sought to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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